IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 27, 2007

STATE OF TENNESSEE v. THORNTON SHAYNE SNAPP

Appeal from the Criminal Court for Sullivan County
No. S51,403 Robert H. Montgomery, Judge

No. E2007-00353-CCA-R3-CD - Filed May 20, 2008

The defendant, Thornton Shayne Snapp, pled guilty in the Sullivan County Criminal Court to one count of failure to appear, a Class E felony. Following a sentencing hearing, the trial court sentenced the defendant to four years in the Department of Correction as a Range II, multiple offender, and ordered that the defendant's sentence be served consecutively to a five-year sentence the defendant received in another case. The defendant appeals, alleging that the trial court erred in denying him alternative sentencing on the failure to appear offense. After reviewing the record, we conclude that the trial court properly sentenced the defendant to incarceration and therefore affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ. joined.

Stephen M. Wallace, District Public Defender; Richard A. Tate, Assistant District Public Defender, for the appellant, Thornton Shayne Snapp.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Smith, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; William Harper, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

According to the presentment filed in this case, on September 29, 2005, the defendant failed to appear in the Sullivan County Criminal Court for his trial on theft of property over $1000. On November 9, 2005, the Sullivan County Grand Jury returned a one-count presentment charging the defendant with failure to appear. Because the offense for which the defendant failed to appear was a Class D felony, the failure to appear offense for which the defendant was charged was a Class E felony. Tenn. Code Ann. § 39-16-609(e) (2006).

On January 19, 2007, the defendant pled guilty to felony failure to appear as a Range II, multiple offender, with the length of the sentence and manner of service to be decided by the trial court. On that same day, the trial court held a sentencing hearing, at which the defendant argued that he was entitled to probation. The trial court denied the defendant's request and sentenced the defendant to four years in the Department of Correction, the maximum sentence permissible for a defendant convicted of a Class E felony and sentenced as a Range II offender. See Tenn. Code Ann. § 40-35-112(b)(5) (2006). The court ordered that this sentence run consecutively to a five-year sentence that the defendant had received in the theft case for which he had failed to appear. This appeal follows.

ANALYSIS

The defendant argues that the trial court erred in imposing a prison sentence and refusing an alternative sentence. We disagree.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991); State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

In determining whether incarceration or an alternative sentence is most appropriate, a trial court should consider whether (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. Ashby, 823 S.W.2d at 169 (citing Tenn. Code Ann. § 40-35-103(1)(A)-(C)). The trial court shall also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. Tenn. Code Ann. § 40-35-210(b)(5) (2006); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). In addition, a trial court should consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Tenn. Code. Ann.

§ 40-35-103(5); Boston, 938 S.W.2d at 438. A defendant convicted of a Class C, D, or E felony and sentenced as an especially mitigated or standard offender "should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (2006). However, under the revised Sentencing Act, "[a] court shall consider, but is not bound by, this advisory sentencing guideline." Id. Furthermore, although probation must be considered, "the defendant is not automatically entitled to probation as a matter of law." Tenn. Code Ann. § 40-35-303(b) (2006), Sentencing Comm'n Comments; State v. Hartley, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991).

We initially note that because the defendant was sentenced as a Range II offender, he was not entitled to a presumption of an alternative sentence. In this case, the presentence report detailed, and the trial court noted at the sentencing hearing, that the defendant had an extensive history of criminal convictions beyond those necessary to establish him as a Range II offender, including three previous felony convictions for failure to appear. The trial court noted that the defendant had a history of failed prior attempts at alternative sentencing, including two previous instances where the defendant's probation had been revoked. In denying the defendant probation, the trial court concluded:

> I think that the interest to society and being protected from possible future criminal conduct, based on his history, is great . . . . Measures less restrictive than confinement have frequently or recently been applied unsuccessfully. I think that putting him on probation would depreciate the seriousness of the offense in this case and I think that it would—again, . . . he was out on bond when he committed the charges [for which] he's sentenced here today, so I would argue that [ordering confinement] provides an effective deterrent to him and protects society as well.

We agree with the trial court's reasoning and therefore conclude that the defendant's issue is without merit.

CONCLUSION

In light of the evidence produced at the sentencing hearing, the trial court properly sentenced the defendant to a prison term and denied alternative sentencing. Therefore, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE